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No. 82-_____

In The

Supreme Court of the United States

October Term, 1982

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KAWASAKI MOTORS CORPORATION,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

---o---

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QUESTIONS PRESENTED

1. WHETHER THE GENERAL COUNSEL'S INTENTIONAL FAILURE TO PROVIDE WITNESS AFFIDAVITS IN EXISTENCE AT THE TIME OF CROSS-EXAMINATION WAS A DENIAL OF FUNDAMENTAL DUE PROCESS IN VIOLATION OF THE JENCKS ACT, 18 USC § 3500 AND THE RULES AND REGULATIONS OF THE NATIONAL LABOR RELATIONS BOARD.
2. WHETHER THE GENERAL COUNSEL'S FAILURE TO TIMELY PROVIDE WITNESS AFFIDAVITS, ITS SURREPTITIOUS ATTEMPTS TO TAPE-RECORD TRIAL CONVERSATIONS AND ITS IMPERMISSIBLE ATTEMPTS TO EXAMINE OPPOSING COUNSEL'S TRIAL PAPERS AMOUNT TO AN INTRUSION OF THE ATTORNEY CLIENT PRIVILEGE AND VIOLATION OF FUNDAMENTAL DUE PROCESS SUFFICIENT TO WARRANT A FINDING THAT KAWASAKI WAS PER SE PREJUDICED BY SUCH CONDUCT.

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---o---

Petitioner, Kawasaki Motors Corporation, respectfully requests that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on September 14, 1982.

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OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is not officially reported, but is reproduced in the Appendices to this Petition as Appendix A.

The opinion of the National Labor Relations Board, dated August 8, 1981, is reported at 257 NLRB No. 69 (1981) and is reproduced in the Appendices to this Petition as Appendix B.

The opinion of the Administrative Law Judge, dated January 29, 1981, is also reported at 257 NLRB No. 69 (1981) and is reproduced in the Appendices to the Petition as Appendix C.

JURISDICTION

The Judgment and Memorandum opinion of the Court of Appeals for the Ninth Circuit was entered on September 14, 1982, and is reproduced in Appendix A to this Petition. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Two statutes cited in this Petition deal with jurisdictional matters, while the other is a fundamental portion of the argument presented in this Petition.

The jurisdictional statutes provide as follows:

29 U.S.C. § 160(f):

> (f) Review of final order of Board on petition to Court. Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was

alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in Section 2112 of Title 28, United States Code (28 USCS § 2112). Upon filing of such petition, the court shall proceed in same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

29 U.S.C. § 1254:

Cases in the court of appeals may be reviewed by the Supreme Court by the following methods:

(1) By Writ of Certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

The substantive statute involved herein provides as follows:

18 U.S.C. § 3500:

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall exercise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, the trial is continued to an adjudica-

tion of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of the court under subsection (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means —

(1) a written statement made by said witness and signed or otherwise adopted or approved by him;

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement; or

(3) a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury.

DESIGNATION OF CORPORATE RELATIONSHIPS

The information to be supplied under Rule 28.1 is as follows: The Kawasaki plant in Lincoln, Nebraska, is wholly owned by Kawasaki Heavy Industries, Akashi, Japan. The Lincoln facility is divided into two distinct corporate entities, Kawasaki Motors Corporation, and Kawasaki Motors Manufacturing. There are no other subsidiary companies owned by any of the corporate entities.

STATEMENT OF THE CASE

The jurisdiction of the Circuit Court below was invoked pursuant to Section 10(f) of the National Labor Relations Act, 29 U.S.C. § 151 et seq. Kawasaki Motors Corporation (hereinafter "Kawasaki") sought review of a decision entered by the National Labor Relations Board (hereinafter "the Board") in favor of the charging party, the United Automobile, Aerospace and Agricultural Implement Workers of America (hereinafter "UAW") and the General Counsel for the Board. That decision found that Kawasaki had violated § 8(a)(1) of the Act, had unlawfully discharged Dan Bennett, and ordered another election.

Kawasaki operates a manufacturing facility in Lincoln, Nebraska, with corporate offices located in Santa Ana, California. The Lincoln facility produces motorcycles, jet skis, and other recreational vehicles. The UAW has successfully attempted on

several occasions to organize the employees at Kawasaki's facility.

Following the second election that it lost, the UAW filed objections to the election. The Complaints were consolidated, and a 13-day hearing was held over a period of time from August 14, 1979 to January 14, 1980, to determine the lawfulness of Kawasaki's conduct. It is the General Counsel's conduct and trial tactics during this hearing that are at issue in this Petition.

A. The Refusal to Provide Affidavits.

The General Counsel's proof of alleged violations was introduced through testimony of employees such as Connie Clare, Dennis Moore, Greg Harm, Bruce Berg and Tom Esch. In all, the General Counsel called a total of 16 witnesses. The Administrative Law Judge (hereinafter "ALJ") necessarily weighed the credibility of the witnesses in determining whether the General Counsel had in fact proved the allegations in the Complaint, since contradictory testimony was presented on behalf of Kawasaki in virtually every instance.

The Board's Rules and Regulations, at Section 102.118 provide in pertinent part as follows:

> (b)(1) Notwithstanding the prohibitions of subsection (a) of this section, after a witness called by the General Counsel or by the charging party has testified in a hearing upon a complaint under Section 10(c) of the Act, the Administrative Law Judge shall, upon motion of the respondent, order the production of any statement (as hereinafter defined) of such witness in the possession of the General Counsel which relates to the

> subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the Administrative Law Judge shall order it to be delivered directly to the Respondent for his examination and use for the purpose of cross-examination.

This section was modeled directly after the decision in *Jencks v. United States*, 353 U.S. 657 (1977), and the subsequent statute, 18 U.S.C. § 3500, commonly referred to as the Jencks Act.

Due to the complexity and length of the trial, a recess was called during the months of October and November. During that time period, employees Berg and Harm gave affidavits to the United States Department of Labor which pertained to the underlying facts of this case. When Berg and Harm were then produced for cross-examination when the hearing resumed, Kawasaki moved for the production of any and all witness affidavits, pursuant to § 102.118. The General Counsel acknowledged the existence and its possession of these Department of Labor affidavits, but intentionally refused to produce them, based upon its own interpretation that they were not covered by the applicable rules. It is not known what potentially prejudicial and inconsistent statements are contained in those affidavits.

The General Counsel also repeatedly failed to timely produce affidavits of key witnesses who testified concerning such allegations as threats of plant closure, unlawful captive audience speeches and other potentially unlawful threats and statements. The ALJ necessarily relied on and credited this testimony in reaching his decision (See Appendix C).

For example, after Kawasaki's counsel had been tendered several affidavits given by employee Clare, it began its cross-examination. During her testimony, it was revealed that Clare had in fact given the Board another affidavit that was not produced by the General Counsel. The General Counsel then informed the ALJ that it had "discovered" the missing Clare affidavit and tendered it to Kawasaki.

On the ninth day of the trial, well after the General Counsel had ceased calling its witnesses and rested its case, it was brought to the attention of the ALJ that an affidavit given by employee Moore had not been turned over to Kawasaki even though that affidavit had been in the possession of the General Counsel when Moore testified.

Later, it was also discovered that the General Counsel had in its possession two statements from Harm, one statement from Esch, and one statement from Berg. These statements, were not provided to Kawasaki's counsel prior to the cross-examination of these witnesses, even though the appropriate request was made.

The General Counsel similarly failed to timely provide all statements made by union organizer, Tom Flores. It was later discovered that the General Counsel had still another affidavit given by Berg that had not been provided. In all, a total of nine affidavits were not timely produced, while the two other affidavits given by Harm and Berg have not been seen and were intentionally withheld by the General Counsel.

B. Other Improper Trial Conduct.

In addition to the failure to properly provide all

witness affidavits, counsel for the General Counsel engaged in other forms of trial misconduct. For example, the General Counsel examined the trial papers, notes and exhibits that had been prepared by Kawasaki's counsel. This unheard of conduct was done while Kawasaki's counsel was away from his table at the rear of the room, obviously without permission, and occurred during Bennett's cross-examination. Rather than attempt to describe this conduct, Kawasaki will let the record speak for itself:

> Mr. Sykes: Don't come over and help yourself to my stuff right now, Counsel.
>
> Judge Herzog: Counsel, don't do that.
>
> Mr. Sykes: Put the document back.
>
> Judge Herzog: You have no right to pick up papers, respondent's counsel's work papers.
>
> Mr. McCarthy: I was looking at Respondent's 7 which he did not show us.
>
> Judge Herzog: You were looking at all of his papers. I do not understand. I have never seen that happen in a courtroom before. (T486)[1]

The General Counsel also attempted to tape-record portions of the hearing and/or conversations between Kawasaki's counsel and its representatives. Prior to the testimony of the first witness, the ALJ noticed a tape recorder underneath a stack of papers at the General Counsel's table. He instructed the General Counsel to take the recorder out of the courtroom or put it away.

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[1]The above reference refers to the trial transcript. Kawasaki is willing to provide a certified copy of that transcript should this Court deem it to be necessary.

The General Counsel argued that it was being used to record testimony of the first witness. However, the recorder was placed on the table nearest to the respondent's counsel, not on the opposite end nearest the witness stand. The ALJ strongly warned the General Counsel about such surreptitious conduct and ordered that the recorder be removed. Nevertheless, the ALJ later remarked that ". . . the Trial Court is entitled to know about it and is not entitled to be argued with when he tells you to turn it off, and then the thing does not get turned off for some, well —." (T1359).

The issue of tape recordings arose again later in the hearing in a different context. The General Counsel attempted to prove a variety of § 8(a)(1) violations through witnesses who attempted to reconstruct what was said at certain employee meetings. However, it was later discovered that the General Counsel had verbatim recordings of these meetings. These tapes clearly revealed that the alleged violations had not occurred.

When this evidence was exposed, the ALJ ordered that the tapes be transcribed. It is interesting, and rather suspicious, that after the ALJ found out about the existence of these tapes and ordered that they be transcribed, the General Counsel decided to withdraw the § 8(a)(1) allegations with respect to certain speeches.

C. The Rulings Below.

The ALJ determined that Kawasaki violated Section 8(a)(1) and 8(a)(3) of the Act by its conduct and in the discharge of Dan Bennett, and ordered another election. The ALJ strongly rebuked the Gen-

eral Counsel's conduct, but did not find that Kawasaki was prejudiced by the General Counsel's tactics. That decision is reproduced in its entirety at Appendix C.

The Board affirmed the ALJ's decision. It also chose to rebuke the General Counsel's conduct, and stated that the actions constituted undisputed errors, though it too ruled that the conduct was not sufficient to prejudice the outcome of the case, since the ALJ could rely on other facts in the record. The Board further ruled that the General Counsel had no affirmative duty to supply the affidavits given to the Department of Labor by Berg and Harm during the trial recess. Its decision is reproduced in its entirety at Appendix B.

On Appeal, the Court of Appeals enforced the Board's Order. The Court also chose to chastise the trial procedures used by the General Counsel. Further, it found that according to the Board's rules and regulations, the General Counsel was required to produce the affidavits given by Harm and Berg to the Department of Labor. However, despite the fact that Kawasaki does not know what is contained in those affidavits, the Court ruled that Kawasaki could point to no actual prejudice, and hence affirmed the Board's decision. The Court's memorandum order is reproduced in its entirety as Appendix A.

The ALJ specifically relied on witness testimony concerning the alleged § 8(a)(1) violations in ruling that Bennett was unlawfully discharged. Without the withheld affidavits, it is not known how these witnesses' credibility would have been affected. Further, the examination of Kawasaki's trial papers by the General Counsel occurred right in the middle

of Bennett's cross-examination. With the repeated and intentional Jencks Act type of violations that occurred, coupled with the framework of an entire trial tainted by procedural improprieties and irregularities on the part of the General Counsel, Kawasaki submits that this Petition must be granted to address these issues.

ARGUMENT

The writ should be granted to resolve the conflict among the administrative and criminal forums concerning the harmless error standards to be applied for nonproduction of documents under the Jencks Act.

The decision below conflicts with this Court's ruling in *Jencks v. United States,* 353 U.S. 657 (1957) and its progeny. The *Jencks* decision basically held that a defendant has a right to examine all pre-trial affidavits of government witnesses after direct examination and prior to cross. This procedural development was subsequently codified into what is now known as the Jencks Act, 18 U.S.C. § 3500.

In *NLRB v. Adhesive Products Corp.,* 258 F.2d 403 (2d Cir. 1958), the court held that the Jencks Act provisions also applied in NLRB hearings. The Board affirmatively recognized this procedural requirement in *Ra-Rich Manufacturing,* 121 NLRB 700 (1958), and subsequently modified its own procedural rules and regulations (29 *C.F.R.* § 102.118) in conformity with the *Jencks* decision.

The application of the Jencks Act to Board proceedings was later articulated in *Harvey Aluminum v. NLRB,* 335 F.2d 78 (9th Cir. 1964). The Ninth Circuit held that under Section 102.118 the NLRB had to

produce documents held by other government agencies. In response to a Board argument that the Jencks Act was binding only in a limited manner, the court stated:

> The rule applies to proceedings of the Board because " 'the laws under which these agencies operate prescribe the fundamentals of fair play.' Their proceedings must 'satisfy the pertinent demands of due process.' " Communist Party of the United States v. Subversive Activities Control Bd., 102 U.S. App. D.C. 395, 254 F.2d 314, 327 (1958).

Id. at 753.

It is quite clear that the Board has thus chosen to adopt the identical procedural protections contained within the Jencks Act. Neither the Board nor the courts have attempted to limit its application in these administrative proceedings. This Court is now asked to determine whether the penalties for non-compliance with the Act which have been articulated in criminal cases will apply with equal force in the administrative setting.

A. The general counsel's failure to produce two witness affidavits in violation of the Board's rules and regulations constitutes reversible error requiring a new trial.

In the opinion below, the Ninth Circuit Court of Appeals interpreted the Board's Rules and Regulations and ruled that the affidavits given by witness Harm and Berg to the Nebraska Department of Labor, which occurred during a trial recess, should have been produced under Section 102.118. This ruling was contrary to the interpretation of both the Board and the Administrative Law Judge. The court con-

cluded, however, that even though some of the underlying fact findings might have been dependent on their testimony, ". . . still the conclusion reached that Kawasaki had been guilty of unfair labor practices would remain." (Appendix A, page 5).

The court's ruling is clearly contrary to the harmless error doctrine that governs such Jencks Act proceedings. Since Kawasaki has never received nor observed these statements, the court must have presumed that the error was harmless and that no prejudice occurred. Such a presumption of harmless error clearly cannot stand in light of this Court's rulings in similar factual settings.

In *Clancy v. United States,* 365 U.S. 312 (1961), this Court held that where the government did not produce verbatim transcripts which were required under the Jencks Act, the conviction could not stand. In response to the government's assertion that this nonproduction was merely harmless error, the Court stated, "Since the production of at least some of the statement withheld was a right of the defense it is not for us to speculate whether they could have been utilized effectively." *Id.* at 316.

The Court was confronted with a similar situation in *Goldberg v. United States,* 425 U.S. 94 (1976). In addressing the harmless error argument, it stated, "Since courts cannot speculate whether [Jencks Material] could have been utilized effectively at trial, . . ., the harmless error doctrine must be strictly applied in Jencks Act cases." *Id.* at 109, n. 21 (quoting *Clancy v. United States, supra.)*

The policy concerns and procedural protections established by this Court in dealing with Jencks Act violations has led other federal courts to grant new

trials, remands for hearings or reversals under similar factual settings. *See, United States v. Beasley,* 576 F.2d 626 (5th Cir. 1978); *Lee v. United States,* 368 F.2d 834 (D.C. Cir. 1966); *United States v. Prince,* 264 F.2d 850 (3d Cir. 1959); *Bergman v. United States,* 253 F.2d 933 (6th Cir. 1958).

The courts have been even more discerning where the failure to provide the documents was intentional or flagrant. In *United States v. Hilton,* 521 F.2d 164 (2d Cir. 1976), the court was confronted with a fact situation where it appeared that the prosecution had deliberately failed to disclose a Jencks Act document. The court stated, "[A] new trial is warranted if evidence is merely material or favorable to the defense." *Id.* at 166. The court remanded the case for a factual determination on the failure to provide the required documents. Similarly, the Fifth Circuit in *United States v. Beasley, supra,* quoting from *Rosenberg v. United States,* 360 U.S. 367 (1959) set out the governing legal standards, stating, "[A]n appellate court should order a new trial unless the circumstances justify the conclusion that a finding that such a denial was harmful error would be clearly erroneous." 576 F.2d at 629.

In the instant case, there is no dispute that the General Counsel had two additional affidavits of witnesses Berg and Harm which they intentionally refused to produce. Kawasaki has absolutely no idea as to what those affidavits may contain. It is quite incredible for the court of appeals to require Kawasaki to show how they were prejudiced by the lack of these affidavits, when Kawasaki does not even know what information the affidavits contain.

The court of appeals obviously presumed that no

prejudice had occurred. If the authorities cited herein have any precedential value at all, and if the Respondents in Board proceedings are to obtain the procedural protections that they are entitled to under Section 102.118 and the Jencks Act, then the ruling below simply cannot stand. Neither the Board nor the courts have ever ruled that the Jencks Act protections apply in only limited fashion to Board proceedings. Hence, based upon the authorities set forth above, Kawasaki's petition must be granted.

B. The General Counsel's trial conduct, Jencks Act violations and infringement upon the attorney-client privilege constitute reversible error requiring a new trial.

The Court of Appeals specifically recognized the form of trial misconduct that Kawasaki was forced to endure. It included:

> Placing a tape recorder on counsel's table in such a position that discussions between Kawasaki's counsel and its representatives could be monitored; surreptitiously examining Kawasaki's files; and concealment of tapes on which actual speeches were recorded and which were exculpatory in character."

(Appendix A, page 2). Despite the recognition of such conduct, the court concluded, "The record does reveal a 'lack of professionalism,' as the ALJ characterized it, but it does not appear prejudice resulted." (Appendix A, pages 2-3).

Similarly, the court tried to distinguish any prejudice that resulted from the General Counsel's repeated failure to produce witness statements prior to cross-examination. Despite the repeated and be-

lated production of Jencks Act documents on nine separate occasions, the court concluded, "We agree with Kawasaki that a tardy production of a witness is not the equivalent of a timely production; . . . In this case the charge that there was prejudice is general . . . . In short, prejudice may be found only if it can be presumed." (Appendix A, pages 3-4).

When taken as a whole, the multiple acts of misconduct that Kawasaki was forced to endure cannot be said to constitute a fair trial lacking in any prejudice or amounting to merely harmless error. The repeated Jencks Act violations coupled with the other procedural improprieties clearly constitute sufficient grounds to rule that Kawasaki has been prejudiced and as such is entitled to a new trial.

This Court has previously recognized the importance of procedural due process in administrative hearings. *NLRB v. Indiana & Michigan Electric,* 317 U.S. 9 (1943); *Morgan v. United States,* 298 U.S. 468 (1936). In the *Indiana & Michigan Electric* case, the court dealt with allegations of procedural improprieties during the trial and stated as follows:

> The statute demands respect for the judgment of the Board as to what the evidence proves. But the court is given discretion to see that before a party's rights are finally foreclosed his case has been fairly heard. Findings cannot be said to have been fairly reached unless material evidence which might impeach, as well as that which will support, its findings, is heard and weighed.

Id. at 22.

Similarly, in *Reilly v. Pinkers,* 338 U.S. 269 (1949), the Court recognized the importance of cross-examination in an administrative hearing, stating:

> It is also contended that the error in restricting cross-examination was harmless here because the memorandum of the factfinding official indicated that he had read the excluded materials and would have made the same adverse findings . . . . The error of this deprivation could not be cured by having the factfinder subsequently examine the material.

Id. at 277.

It is submitted that this Court has heretofore never been confronted with such a plethora of procedural violations and trial misconduct in an administrative hearing. Hence, it has not had to articulate at what point the prejudice can be said to have occurred. Kawasaki submits that due to the egregiousness of the violations in the instant case, it was prejudicial per se for the General Counsel to conduct an administrative proceeding in this manner.

The General Counsel attempted to tape record conversations and trial testimony, as well as examine Kawasaki's trial papers, all of which are in contravention of the attorney-client privilege. When coupled with the background of intentional Jencks Act violations that permeated the trial, it is not known what more has to be shown to establish that prejudice has occurred.

In *Lee v. United States,* 368 F.2d 834 (D.C. Cir. 1966), the Court recognized prejudice caused by both the destruction of Jencks Act documents and a delay between the offense and the arrest before concluding that the conviction of the defendant had to be reversed. In addition, the authorities set forth above repeatedly state that were the Jencks Act violations to occur against the background of other procedural

errors and misconduct, the defendant is prejudiced per se and the convictions cannot stand. A similar ruling is thus warranted in the instant case.

Kawasaki has thus shown that (1) two key witness affidavits were never produced; (2) nine other affidavits were not timely provided; (3) the General Counsel attempted to surreptitiously tape record portions of the hearing and other conversations; (4) the General Counsel examined Kawasaki's trial documents during the middle of Bennett's cross-examination; and (5) the General Counsel tried to conceal exculpatory evidence. Though these items individually may not constitute a finding of prejudice, they collectively constitute a case of undeniable trial misconduct and prejudice which should be reviewed by this Court.

CONCLUSION

Based upon all of the foregoing, Kawasaki submits that its petition for certiorari should be granted.

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